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RONALD BEADLE

v.

HAMZAH HM SAMAN & ORS

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COURT OF APPEAL, PUTRAJAYA
RICHARD MALANJUM JCA
HASHIM YUSOFF JCA
ABDUL WAHAB PATAIL J
[CIVIL APPEAL NO: W-01-56-2001]

C

10 DECEMBER 2006

CIVIL PROCEDURE: *Striking out - Appeal against striking out of suit - Suit claiming for damages for wrongful act of withholding passport - Whether there were triable issues that warranted full hearing of claim -*

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Income Tax Act 1967, s. 104 - Public Authorities Protection Act 1948, s. 2(a)

The appellant, a British citizen, was employed as a Director of Operations by SEA Helicopters (M) Sdn Bhd ('SEAH'). When the

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appellant resigned, the 2nd respondent, the Inland Revenue Department, directed SEAH to remit RM22,778.70 being the sum of deductions made from the appellant's monthly salaries towards payment of his income tax. SEAH failed to make such remittance to the 2nd respondent, as a result of which the 3rd respondent,

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the Government of Malaysia, commenced legal proceedings against SEAH for recovery of the outstanding income tax. In the interim period, the 1st respondent issued a certificate ('the said certificate') to the Inspector General of Police and the Director General of Immigration under s. 104 of the Income Tax Act 1967 ('ITA') to

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prevent the appellant from leaving Malaysia unless the appellant's income tax was settled or security furnished to the satisfaction of the Director General of Inland Revenue. Following this, the police seized the appellant's international passport and despite numerous requests and appeals to the respondents, the respondents did not

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release the passport to the appellant. In the meantime, the 3rd respondent obtained a winding-up order against SEAH and thereafter decided not to pursue its action against SEAH to recover the outstanding income tax. Instead the 3rd respondent commenced an action against the appellant in the sessions court.

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The sessions court allowed the claim but the claim was later dismissed upon the appellant's appeal to the High Court. The passport of the appellant was then returned to him on 21 April

1998 after a lapse of 16 years. The appellant then commenced this suit against the respondents claiming damages for the alleged wrongful act done, neglect or default committed by the 1st respondent as a public officer acting as an agent of and under the instructions of the respondents. The respondents applied to strike out the appellant's suit but that was dismissed by the senior assistant registrar. The 1st and 3rd respondents then appealed to the judge in chambers who allowed the appeal and ordered the suit to be struck out. Hence, the appellant's appeal.

Held (allowing the appeal)
Per Richard Malanjum JCA delivering the judgment of the court:

(1) The several parties involved herein did different actions that culminated in the seizure and retention of the appellant's passport for a period of not less than 16 years. The act of issuing the certificate and the subsequent seizure of the passport should be construed as one act for the purposes and enforcement of s. 2(a) of the Public Authorities Protection Act 1948 ('PAPA'). However, the release of the passport and the failure to take any positive step to revoke the said certificate or at least to inform the relevant parties that the said certificate was no longer effective could not be taken as one and the same act as the issuance and seizure thereof. It was not shown during the hearing of this appeal that the police or the immigration would not enforce the demand of the said certificate against the appellant in the next available opportunity. The dismissal of the claim against the appellant did not include the annulment of the said certificate. In any event for the purposes of s. 2(a) PAPA, the dismissal of the claim itself was not sufficient. So long as the certificate had not been formally cancelled or annulled, it was subject to enforcement by the police and/or the immigration. Hence, the failure of the DG of Income Tax to formally withdraw the said certificate or at least inform the relevant parties to ignore it allowed for the continuance of an act which continued to cause damage to the appellant. The appellant's claim was, therefore, not statute barred. (paras 22)

(2) During the period when the respondents retained the appellant's passport, the damage to the appellant continued. Hence, his cause of action only began to run from the time his passport was released, *ie*, 24 April 1998. Since he filed his claim on 21 May 2000, he was well within the 36 months period as prescribed in the second limb of s. 2(a) PAPA. (para 23)

(3) The power to summarily dismiss a claim or defence should only be exercised in a plain and obvious case. In the present case, there were several triable issues that required the full hearing of the claim. Firstly, whether the issuance of the said certificate was justified when the appellant had paid his taxes *via* deductions from his monthly salaries and whether that rendered s. 104(1) ITA inapplicable. Secondly, whether s. 104(1) ITA required an objective or subjective opinion of the Director General before a decision could be made to issue a certificate thereunder. Thirdly, whether s. 104(2) ITA makes it mandatory for the police or immigration to comply with the request, instruction or direction contained in the said certificate issued by the Director General of Income Tax notwithstanding any prevailing facts and circumstances as to the case. Fourthly, whether the conduct of the Director General of Income Tax was reasonable when he failed to recover the outstanding income tax from the appellant's former employer which already collected it from the appellant instead of pursuing the claim against the appellant. (para 24 & 25)

Bahasa Malaysia *translation of headnotes*

Perayu, seorang warganegara Britain, bekerja sebagai Pengarah Operasi di SEA Helicopters (M) Sdn Bhd ('SEAH'). Apabila perayu meletak jawatan, responden kedua, Jabatan Hasil Dalam Negeri, telah mengarahkan SEAH supaya meremitkan kepadanya sejumlah RM22,778.70 yang berupa cukai pendapatan perayu dari potongan gajinya. SEAH gagal berbuat demikian dan berikutnya responden ketiga, iaitu Kerajaan Malaysia, memulakan guaman terhadap SEAH bagi mendapatkan cukai pendapatan tertunggak tersebut. Sementara itu, responden pertama telah mengeluarkan sijil ('sijil tersebut') kepada Ketua Polis Negara dan Ketua Pengarah Imigresen di bawah s. 104 Akta Cukai Pendapatan 1967 ('ITA') bagi menghalang perayu dari meninggalkan Malaysia kecuali cukai pendapatan beliau dibayar atau satu jaminan yang memuaskan

Ketua Pengarah Hasil Dalam Negeri baginya diberi. Apapun, pihak polis kemudian merampas pasport antarabangsa perayu dan, walaupun permohonan dan rayuan demi rayuan dibuat kepada responden-responden untuk mengembalikan pasport, pasport tersebut terus dipegang oleh responden-responden. Responden ketiga, sementara itu, memperoleh perintah penggulungan terhadap SEAH dan selepas itu memutuskan untuk tidak meneruskan tuntutan cukai pendapatannya terhadap SEAH. Sebaliknya, responden ketiga memulakan tuntutan terhadap perayu di mahkamah sesyen. Mahkamah sesyen membenarkan tuntutan, tetapi keputusan tersebut kemudian diakas oleh Mahkamah Tinggi. Berikutan itu, pasport perayu telah dikembalikan kepadanya pada 21 April 1998, iaitu selepas 16 tahun berlalu. Maka perayu memfail kes di sini terhadap responden-responden menuntut gantirugi atas perlakuan salah, kecuaian atau kemungkiran responden pertama, selaku pegawai awam yang bertindak bagi pihak responden-responden. Responden-responden memohon untuk membatalkan tuntutan perayu, tetapi permohoan ditolak oleh Penolong Kanan Pendaftar. Responden pertama dan ketiga kemudian merayu kepada hakim dalam kamar yang memerintahkan tuntutan dibatal. Perayu dengan itu merayu.

Diputuskan (membenarkan rayuan)
Oleh Richard Malanjum HMR menyampaikan penghakiman mahkamah:

(1) Pihak-pihak yang terbabit di sini telah melakukan tindakan-tindakan yang berbeza yang berakhir dengan perampasan dan pemegangan pasport perayu untuk tempoh 16 tahun. Tindakan mengeluarkan sijil dan tindakan merampas pasport yang menyusul sejurus selepas itu harus ditafsir sebagai satu tindakan sahaja bagi maksud s. 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 ('PAPA'). Bagaimanapun, tindakan mengembalikan pasport dan kegagalan mengambil langkah positif bagi membatalkan sijil berkenaan atau setidak-tidaknya memberitahu pihak-pihak relevan bahawa sijil tersebut tidak lagi berkuatkuasa, tidak boleh dianggap sebagai satu tindakan tunggal yang sama seperti tindakan pengeluaran sijil dan perampasan pasport. Tidak dibuktikan di pendengaran rayuan ini bahawa pihak polis atau imigresen tidak akan menguatkuasakan kehendak sijil berkenaan terhadap perayu jika berpeluang berbuat demikian. Penolakan tuntutan terhadap

perayu juga tidak merangkumi pembatalan sijil berkenaan. Apapun, bagi maksud s. 2(a) PAPA, penolakan tuntutan itu sahaja tidak mencukupi. Selagi sijil tidak dilupus atau dibatalkan secara formal, ianya masih boleh dikuatkuasakan oleh polis mahupun imigresen. Oleh itu, kegagalan Ketua Pengarah Cukai Pendapatan menarik balik sijil tersebut ataupun sekurang-kurangnya memberitahu pihak-pihak terbabit untuk tidak mengendahkannya telah menyebabkan berterusannya tindakan yang terus menerus membawa kerugian kepada perayu. Tuntutan perayu, dengan itu, tidak dihalang oleh statut.

(2) Dalam tempoh responden-responden memegang pasport perayu, kerugian terus dialami oleh perayu. Oleh itu, kausa tindakan di sini hanya bermula dari tarikh pasportnya dikembalikan, iaitu 24 April 1998. Dan oleh kerana beliau memfailkan tuntutannya pada 21 Mei 2000, maka tuntutannya dirangkumi oleh tempoh 36 bulan seperti yang ditetapkan jejari kedua s. 2(a) PAPA.

(3) Kuasa untuk menolak terus sesuatu tuntutan atau pembelaan harus dilaksanakan hanya dalam kes-kes yang terang dan jelas sahaja. Dalam kes semasa, terdapat beberapa isu yang perlu dibicarakan yang mewajarkan pendengaran penuh tuntutan. Pertama, sama ada pengeluaran sijil tersebut berjustifikasi memandangkan perayu telah membayar cukainya melalui pemotongan gaji bulanannya dan sama ada itu telah menjadikan s. 104(1) ITA tidak terpakai. Kedua, sama ada di bawah s. 104(1) ITA Ketua Pengarah harus memberikan pendapat objektif atau subjektifnya sebelum mengambil keputusan untuk mengeluarkan sijil. Ketiga, sama ada s. 104(2) ITA mewajibkan pihak polis atau imigresen mematuhi permintaan atau arahan Ketua Pengarah Cukai Pendapatan seperti yang terkandung di dalam sijil dalam apa keadaan sekalipun. Keempat, sama ada tingkah laku Ketua Pengarah Cukai Pendapatan munasabah bilamana beliau gagal mendapatkan cukai pendapatan yang tertunggak dari majikan terdahulu perayu yang telahpun mengumpul cukai tersebut dari perayu dan sebaliknya bertindak menuntut cukai tersebut dari perayu sendiri.

Case(s) referred to:

Bandar Builders Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat [1979] 1 MLJ 23 ***(refd)***

Carey v. Bermondsey Borough Council [1906] 94 LT 216 ***(refd)***

Carey v. Metropolitan Borough of Bermondsey 20 TLR ***(refd)***

Credit Corporation (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

Ibrahim Mohideen Kutty v. Timbalan Menteri Dalam Negeri [2003] 6 CLJ 144 HC ***(refd)***

Lee Nyan Choi v. Voon Noon [1979] 2 MLJ 28 ***(refd)***

Mak Koon Yong & Anor v. Municipal Councillors, Malacca [1967] 1 MLJ 256 ***(refd)***

Markey v. Tolworth Joint Isolation Hospital District Board [1900] QBD 454 ***(refd)***

Sr Katherine Lim KH v. Ketua Pengarah Perkhidmatan Perubatan Malaysia & Ors [1997] 2 CLJ 564 CA ***(dist)***

Legislation referred to:

Income Tax Act 1967, s. 104(1), (2), (4), (5)
Public Authorities Protection Act 1948, s. 2(a)
Rules of the High Court 1980, O. 18 r. 19

Public Authorities Protection Act 1893 [UK], s. 1

For the appellant - Kan Wong Hin (Jeffery Wong with him); M/s Jeffery Wong, Noorul & Lim
For the respondents - Kamaruddin Mohd Said SFC

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S6-21-64-2000]

Reported by Usha Thiagarajah

JUDGMENT

Richard Malanjum JCA:

Introduction

[1] On 28 July 2000, the respondents applied by way of summons in chamber to strike out the appellant's writ of summons and statement of claim under O. 18 r. 19(1)(b) or (d) of the Rules of the High Court 1980. The learned senior assistant registrar (SAR) dismissed the application with costs. The 1st and 3rd respondents successfully appealed to the judge in chambers.

The writ of summons and the statement of claim of the appellant were therefore ordered to be struck out. Dissatisfied with the decision of the High Court the appellant thus appealed to this court.

[2] At the outset of the hearing the learned senior federal counsel (SFC) appearing for the respondents applied for security for costs on the ground that the appellant did not reside in Malaysia. A sum of Ringgit Malaysia Ten Thousand (RM10,000) was agreed and duly settled between the parties. We then proceeded to hear the appeal. At the conclusion of the hearing we were unanimous in our decision to allow the appeal with costs. We now give our reasons upon request for the purpose of the hearing proper of the suit.

The Brief Facts

[3] The appellant, a British citizen at the material time, was employed as a Director of Operations by the SEA Helicopters (M) Sdn. Bhd. (SEAH). Upon the appellant's resignation in SEAH on or about 31 December 1980, the 2nd respondent directed SEAH to remit RM22,778.70 being the deduction made from the appellant's monthly salaries towards payment of his income tax. However, SEAH failed to make such remittance to the 2nd respondent. As a result the 3rd respondent commenced legal proceeding against SEAH for the recovery of the outstanding income tax.

[4] Meanwhile, on 17 December 1981, the 1st respondent in his capacity as the Assistant Director of Inland Revenue acting under s. 104 of the Income Tax Act 1967 issued a certificate to the Inspector General of Police and the Director General of Immigration to prevent the appellant from leaving Malaysia unless the appellant's income tax was settled or security was furnished to the satisfaction of the Director General of Inland Revenue. In accordance with the certificate, the police seized the appellant's international passport. Despite numerous requests and appeals to the respondents, the respondents failed to withdraw or release the passport to the appellant.

[5] In the meantime, on or about 13 February 1984, 3rd respondent obtained a winding up order against SEAH and in or around March 1984, a receiving officer was appointed as the liquidator for SEAH. In turn the 3rd respondent decided not to pursue further action against SEAH to recover the appellant's outstanding income tax. However, the 3rd respondent commenced an action against the appellant to claim for the outstanding income tax. Before the Sessions Court the claim was successful. However, the appellant successfully appealed to the High Court. The claim of the 3rd respondent against the appellant was dismissed on 17 February 1998. In turn the passport of the appellant was returned to him on 21 April 1998 after a lapse of 16 years.

[6] The appellant therefore commenced this suit under appeal against the respondents claiming damages for the alleged wrongful act done or neglect or default committed by the 1st respondent as a public officer acting as an agent of and under the instructions of the 2nd and 3rd respondents.

Before The High Court

[7] The High Court in addressing the claim by the appellant focused on two main issues. Firstly in relation to the application of the second limb of s. 2(a) of the Public Authorities Protection Act 1948 (PAPA). The issue was whether the respective acts, that is by the 1st respondent in issuing the aforementioned certificate and the refusal to withdraw the same and by the 3rd respondent in seizing the passport of the appellant and in refusing to release it, constituted a continuous act or a single act. Secondly, whether the acts of the 1st respondent in issuing the certificate and that of the 3rd respondent in seizing the passport respectively were unlawful thereby excluding them from the protection of s. 104(5) Income Tax Act 1967 (ITA).

[8] The learned High Court Judge after hearing submissions ruled in favour of the respondents. Briefly the reasons given are as follows:

(i) the acts of the 1st respondent and 3rd respondent as described hereinabove were held to be a single act for the purpose of computing the period of 36 months as stipulated under s. 2(a) of PAPA. The case of *Sr Katherine Lim KH v.*

Ketua Pengarah Perkhidmatan Perubatan Malaysia & Ors. [1997] 2 CLJ 564 was relied upon as the authority for the finding; and

(ii) that the protection of s. 104(5) of ITA was available to the respondents for the acts done which were lawful since at the material time the appellant did have an outstanding income tax payable. Being a foreigner there was the likelihood that he would leave the country with the tax due unpaid.

Before The Court Of Appeal

[9] Before us there were four issues raised on behalf of the appellant. The first and second issues were as those canvassed in the High Court. The third issue was on the submission that the ouster clause in s. 104(5) ITA could never exclude the jurisdiction of the court. The last issue submitted was that the claim was not a plain and obvious case suitable to be struck out under O. 18 r. 19 of the Rules of the High Court 1980.

Contentions And Findings

[10] Learned counsel for the appellant argued that words "continuance of injury or damage ... after the ceasing thereof" within the second limb of s. 2(a) of PAPA mean the continuance of the act which caused the injury or damage and for the purpose of computing the period of limitation, time would begin to run when the act causing the injury or damage ceased. Learned counsel said that the certificate issued by the 1st respondent was never withdrawn and thus the injury for the purpose of PAPA continued. On the seizure of the passport he said that it was only released to the appellant on 21 April 1998. Learned counsel submitted that the continuous injury or damage to the appellant was the deprivation of his fundamental liberty brought about by the issuance of the certificate and thereafter the seizure of his passport. According to learned counsel such acts were continuous acts which only ceased when the High Court in Civil Appeal No. R1-12-336-96 decided in favour of the appellant thereby enabling his passport to be released to him on 21 April 1998. It was the contention of learned counsel that the right to sue only arose from the date of release of the passport. Any action must therefore be filed on or before 16 February 2001. It was suggested that the alternative date was on or before 20 April 2001. Since the present action was instituted on 31 May 2000 it was well within the 36 months limitation as provided under the PAPA.

[11] The learned SFC submitted that the learned High Court Judge was correct in his conclusion. He admitted that there was no formal letter on the withdrawal of the certificate. However the law only requires the release of the passport.

12] In our view the pivotal issue is on the determination of the scope of s. 2(a) of PAPA and s. 104(1), (2) and (4) of ITA.

[13] Now, s. 104 of ITA reads:

104. Recovery from persons leaving Malaysia

(1) The Director General, where he is of the opinion that any person is about or likely to leave Malaysia without paying:

(a) all tax payable by him (whether or not due or due and payable);

(b) all sums payable by him under section 103(3), (4), (5), (6), (7) or (8); and

(c) all debts payable by him under section 107A(2) or 109(2) or 109B(2), may issue to any Commissioner of Police or Director of Immigration a certificate containing particulars of the tax, sums and debts so payable with a request for that person to be prevented from leaving Malaysia unless and until he pays all the tax, sums and debts so payable or furnishes security to the satisfaction of the Director General for their payment.

(2) Subject to any order issued or made under any written law relating to banishment or immigration, any Commissioner of Police or Director of Immigration who receives a request under subsection (1) in respect of any person shall take or cause to be taken all such measures (including the use of reasonable force and the seizure, removal or retention of any certificate of identity and any passport, exit permit or other travel document relating to that person) as may be necessary to give effect to it.

(3) The Director General shall cause notice of the issue of a certificate under subsection (1) to be served personally or by registered post on the person to whom the certificate relates:

Provided that the non-receipt of the notice by that person shall not invalidate anything done under this section.

A (4) Where a person in respect of whom a certificate has been issued under subsection (1):

(a) produces a written statement signed on or after the date of the certificate by the Director General or an authorized officer to the effect that all the tax, sums and B debts specified in the certificate have been paid or that security has been furnished for their payment; or

(b) pays all the tax, sums and debts specified in the certificate to the officer in charge of a police station or C to an immigration officer, the statement or the payment, as the case may be, shall be sufficient authority for allowing that person to leave Malaysia.

(5) No legal proceedings shall be instituted or maintained against the Government, a State Government, a police officer or any D other public officer in respect of anything lawfully done under this section or section 115(2).

[14] Contrary to the submission of learned counsel for the appellant we are of the opinion that s. 104(5) of ITA cannot be described as an ouster clause. It does not prohibit anyone from E filing a claim. All it does is to provide a defence to such a claim.

[15] Section 2(a) of PAPA reads:

Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation F against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:

G (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

H **[16]** Thus s. 2(a) of PAPA provides that any suit, action, prosecution or other proceeding commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or I authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority shall not lie or instituted unless:

(a) it is commenced within thirty-six months next after the act, neglect or default complained of; or

(b) in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof.

[17] Two sets of situations are therefore envisaged for the limitation periods stipulated therein to arise. The first set deals with where the 'act, neglect or default complained of' referred to is confined to a single act, neglect or default and does not involve an element of continuance thereof and that a single act per se would constitute a complete cause of action. (See: (Malaysia) in *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 (SC).

[18] The other set is where the limitation period begins to run when the injury or damage ceases. (See: *Ibrahim bin Mohideen Kutty v. Timbalan Menteri Dalam Negeri,* High Court [2003] 6 CLJ 144).

[19] This section was also succinctly explained by Wan Sulaiman J (as he then was) in the case of *Mak Koon Yong & Anor v. Municipal Councillors, Malacca* [1967] 1 MLJ 256. After referring to the English Court of Appeal case of *Carey v. Metropolitan Borough of Bermondsey* 20 TLR the learned judge said this at p. 259:

> Court of Appeal held in respect of that section of the English Act which is in *pari materia* with our section 2(a) that "the language of the section was reasonably plain and it was manifest that the continuance of the injury or damage meant the continuance of the act which caused the damage." Time would therefore begin to run for the purposes of the Ordinance, from the time when the act was caused, not from the time when the injury or damage ceased, or in the case of a continuing injury or damage, when the act causing the injury or damage ceased.

[20] Indeed in *Carey v. Bermondsey Borough Council* [1906] 94 LT 216 the word 'continuance' found in s. 1 of the Public Authorities Protection Act 1893 of the United Kingdom was construed to mean "a continuing cause of action" or the continuance of the act which caused the damage. (See also: *Markey v. Tolworth Joint Isolation Hospital District Board* [1900] QBD 454).

[21] The facts of this instant appeal are not on all fours with the case of *Sr Katherine Lim KH v. Ketua Pengarah Perkhidmatan Perubatan Malaysia & Ors. (supra)*. In that case there was no dispute that the main issue for determination was the date of dismissal which constituted the act complained of. It was held that the date in the gazette was the date of dismissal. Hence, we agree with the submission of learned counsel for the appellant that the learned High Court Judge erred in applying the ratio of that case to this instant appeal without considering their factual disparities.

[22] There are several parties involved in this instant appeal. Each party did different actions which culminated in the seizure and retention of the passport of the appellant for a period of not less than 16 years. The act of issuing the certificate and the subsequent seizure of the passport should be construed as one act for the purposes and enforcement of s. 2(a) of PAPA. However, the release of the passport and the failure to take any positive step to revoke the certificate issued or at least to inform the relevant parties that it is no longer effective cannot, by any stretch of imagination, be taken as forming one and same act as the issuance and seizure. It was not shown to us during the hearing of this appeal that the Police or the Immigration would not enforce the demand of the same certificate against the appellant in the next available opportunity. The dismissal of the claim against the appellant did not include the annulment of the certificate. In any event for the purposes of s. 2(a) of PAPA we do not think the dismissal of the claim itself is sufficient. So long as the certificate has not been formally cancelled or annulled it is subject to enforcement by the Police and/or the Immigration. Hence, in our view the failure by the Director General of Income Tax to formally withdraw the certificate or at least inform the relevant parties to ignore it allows for the continuance of an act which continues to cause damage to the appellant. On this point alone we are of the unanimous view that the claim of the appellant is not statute barred.

[23] Further, we are also in agreement with learned counsel for the appellant that during the period when the passport of the appellant was retained by the respondents the damage to the appellant continued. Hence, his cause of action only began to run from the time his passport was released, that is, from 24 April

1998. Since he filed his claim on 21 May 2000 he was therefore well within the 36 months period as prescribed in the second limb of s. 2(a) of PAPA.

[24] The next issue is whether there are triable issues involved in this case. This relates more to s. 104(5) of ITA on the question of whether the act or acts were lawfully done bearing in mind the facts and circumstances of this case and the application of the relevant sections thereto.

[25] Having given our anxious consideration on all the materials and the submissions of parties before us we are of the unanimous view that there are several triable issues which require the full hearing of the claim. The power to summarily dismiss a claim or defence should only be exercised in a plain and obvious case. (See: *Lee Nyan Choi v. Voon Noon* [1979] 2 MLJ 28; *Bandar Builders Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7). In our view some of the triable issues are as follows:

(a) whether the issuance of the certificate was really necessary and justified in law bearing in mind the apparent undisputed background facts and circumstances. In other words whether the payments by the appellant to his former employer by way of deductions from his monthly salaries of all the taxes payable by him constituted payments for his income taxes so as to render s. 104(1) of ITA inapplicable;

(b) whether s. 104(1) of ITA requires an objective or subjective opinion of the Director General before a decision could be made to issue a certificate thereunder. This is a serious question in law which would require mature consideration and not by way of summary dismissal or simply ignored. (See: *Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat* [1979] 1 MLJ 23);

(c) whether s. 104(2) of ITA makes it mandatory upon being served with a certificate issued by the Director General of Income Tax, for the Police or Immigration to comply with the request, instruction or direction contained therein notwithstanding any prevailing facts and circumstances as in this case; and

A (d) whether the conduct of the Director General of Income Tax was reasonable and in consonant with the overall scheme of s. 104 of ITA and thus lawful even when he failed to recover from the former employer of the appellant which had already collected all the income taxes payable by the appellant and
B instead pursued the claim against the appellant.

[26] We hasten to add that the foregoing issues should not be considered exhaustive or even binding upon the trial Judge or the parties when this case comes up for full hearing. The trial court
C and/or the parties should be at liberty either to vary, add, reduce or expand all or any of them in order for the trial court to come to its decision on the dispute between the parties.

[27] Accordingly to summarily conclude that the acts of issuing
D the certificate by the Director General of Income Tax, the seizure of the passport by the police, the failure to formally withdraw the certificate and the release of the passport to the appellant were one and single act and lawful without the benefit of hearing oral evidence from the relevant witnesses and detailed arguments and
E mature consideration on the relevant laws, would tantamount, in our view, to a denial of a fair trial to the appellant.

[28] For the above reasons we allowed the appeal with costs to be taxed. Deposit to be refunded to the appellant.

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